80-690

Supreme Court, U. S.
FILED
OCT 23 1980
MICHAEL RODAK, JR., CLERK

No. _____

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM 1980

DONALD G. HATTEN)
and TAMMA T. HATTEN,)
H. A. TRUE, JR. and)
JEAN D. TRUE,)
HENRY A. TRUE, III,)
and KAREN S. TRUE,)
DAVID L. TRUE and)
MELANIE A. TRUE,)
DIEMER D. TRUE, III)
and SUSAN L. TRUE,)
)
Petitioners,)
)
vs.)
)
COMMISSIONER OF)
INTERNAL REVENUE,)
)
Respondent.)

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the per curiam opinion of the United States Court of Appeals for the Tenth Circuit dismissing the appeals by Petitioners from an order of the United States Tax Court should be reversed.

2. Whether the order of the Tax Court of November 27, 1979 ordering the consolidation for trial of the case of Allen R. True and Cynthia F. True vs. Commissioner, Tax Court docket number 13160-78, with the Tax Court cases of the five petitioners herein is appealable.

3. Whether the order of the Tax Court of November 27, 1979 should be reversed on the grounds that it is a collateral order which goes beyond the permissible objective of judicial economy to deny the parties their due process right to prosecute their own separate and

distinct claims or defenses without having them so merged into the claims or defenses of others that irreparable injury will result.

PARTIES TO THE PROCEEDING

All parties to the proceeding are included in the caption of the case.

TABLE OF CONTENTS

	Page(s)
Parties to the Proceeding	2
Table of Cases	4
Table of Other Authorities	5
Opinions of the Courts Below	6
Jurisdiction of the Supreme Court	6
Statute which the Case Involves	7
1. Title 26 U.S.C., Section 7482, Courts of Review	7
2. Title 28 U.S.C., Section 1291, Final Decisions of District Courts	8
Concise Statement of the Case	8
1. Parties	8
2. Course of the Proceedings	10
3. Statment of Facts	13
Argument	15
I. There are Special and Important Reasons for Granting Certiorari in these Cases	15
II. The Tax Court Order of November 27, 1979 is Appealable	16

III. Consolidation would cause Irreparable Injury and Substantial Prejudice to H. A. True 20

IV. The Court of Appeals for the Tenth Circuit failed to recognize the Irreparable Injury to H. A. True 23

TABLE OF CASES

Page(s)

Cohn v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949) . . . 17,19,20

Eisen v. Carlisle & Jacquelin 417 U. S. 156, 94 S. Ct. 2140, 40 L. Ed. 2d 731 (1973) 19,20

Garber v. Randell, 477 F.2d 711 (2d Cir. 1973) . . . 19

In Re Master Key Litigation, 529 F.2d (2d Cir. 1975) 16

Katz v. Realties Equities Corp., 521 F.2d 1354 (2d Cir. 1975) . . 19

Lee v. Western Wood Processors, Inc., 313 F.2d 13 (10th Cir. 1962) . . 20

MacAlister v. Guterma, 263 F.2d 75 (2d Cir. 1958) . . . 19

TABLE OF STATUTES AND OTHER AUTHORITIES

	Page(s)
Title 26 U.S.C., Section 7442	10
Title 26 U.S.C., Section 7482 . . .	7,16
Title 28 U.S.C., Section 1254	7
Title 28 U.S.C., Section 1291 . . .	8,16
9 Moore's Federal Practice ¶213.03 [1.-3], pp. 13-22	17

OPINIONS OF THE COURTS BELOW

1. The order of the Special Trial Judge of the United States Tax Court dated August 27, 1979 is included in the appendix hereto marked Appendix A.

2. The order of the Chief Judge of the United States Tax Court dated November 27, 1979 is included in the appendix hereto marked Appendix B.

3. The slip opinion of the United States Court of Appeals for the Tenth Circuit dated July 25, 1980 is included in the appendix hereto marked Appendix C.

JURISDICTION OF THE SUPREME COURT

A concise statement of the grounds on which the jurisdiction of the United States Supreme Court is invoked follows:

1. The date of the opinion of the United States Court of Appeals for the Tenth Circuit and the date of its entry is July 25, 1980.

2. There are no orders respecting a rehearing or granting an extension of time within which to petition for certiorari.

3. It is believed that Title 28 U.S.C., Section 1254 confers on this Court jurisdiction to review the judgment or decree in question by writ of certiorari.

STATUTES WHICH THE CASE INVOLVES

This case involves the following statutes:

1. Title 26 U.S.C., Section 7482, Courts of Review.

> (a) Jurisdiction.-The United States Courts of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in Section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by

> the Supreme Court of the United States upon certiorari in the manner provided in Section 1254 of Title 28 of the United States Code.

2. Title 28 U.S.C., Section 1291, final decisions of District Courts.

> (a) The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.

CONCISE STATEMENT OF THE CASE

1. Parties. These are five income tax cases involving members of the H. A. True, Jr. family of Casper, Wyoming. The names of the parties, their relationship and the Tax Court docket numbers are: H. A. True, Jr. and Jean D. True, Docket No. 13158-78, who are the Father and Mother; Tamma T. Hatten and Donald G. Hatten, Docket No. 13157-78, Daughter and Spouse; Henry A. True, III and Karen S. True, Docket No. 13159-78, Son and Spouse;

David L. True and Melanie A. True, Docket No. 13161-78, Son and Spouse; Diemer D. True and Susan L. True, Docket No. 13167-78, Son and Spouse, the caption, Diemer D. True, III, is incorrect.

The Tax Court Order of November 27, 1979 orders that the cases of the five members of the H. A. True, Jr. family and their spouses be consolidated with the case of Allen R. True and Cynthia F. True, Docket No. 13160-78, who is the brother of H. A. True, Jr., and Allen's spouse. The five members of the H. A. True, Jr. family reside in Casper, Wyoming and Allen R. True and his spouse reside on a ranch near Tucson, Arizona. For convenience we will refer to the H. A. True, Jr. family as H. A. True, and Allen R. True and his spouse as Allen True.

H. A. True has conceded that all five of their cases be consolidated for

trial in the Tax Court. This appeal is from the Order of the Tax Court ordering that the Allen True case be consolidated with the H. A. True cases.

2. Course of the Proceedings. The petitions for redetermination of proposed deficiencies in income taxes for the years 1971 and 1972 of all six taxpayers here involved were mailed to the Tax Court on or about November 22, 1978. The basis for the jurisdiction of the Tax Court is Title 26, U.S.C., Section 7442. Pursuant to a request filed with the Tax Court, the place of trial of the H. A. True cases was designated to be Denver, Colorado and for Allen True to be Phoenix, Arizona. On or about January 24, 1979 the Commissioner of Internal Revenue filed his answer to all six petitions and filed motions requesting that the place of trial of the

Allen True case be changed to Denver, Colorado and that all six cases be consolidated for trial.

The petitioners in all six cases filed objections to the Commissioner's motion to consolidate the Allen True case with those of H. A. True, and Allen True filed his objection changing the place of trial to Denver, Colorado. On March 7, 1979 a hearing was held before Special Trial Judge Falk of the Tax Court on the various motions, and upon the conclusion of the hearing, Judge Falk indicated his intention to take under advisement the matter of consolidation of the Allen True case with the other five and the place of trial. Briefs were filed by the parties, and on August 27, 1979 Judge Falk filed an Order directing that all six cases be consolidated and that the place of trial of the Allen True case be changed to Denver, Colorado. See Appendix A hereto.

H. A. True filed exceptions to the Special Trial Judge's Order directing consolidation, which exceptions were concurred in by counsel for Allen True. The Chief Judge of the Tax Court entered an Order on November 27, 1979 ratifying and confirming the Order of the Special Trial Judge entered August 27, 1979 with a proviso that the Trial Judge to whom the case shall be assigned for trial may order that a portion of the proceedings be held at Phoenix, Arizona if it appears that unnecessary costs, delay or duplication may be thereby avoided. See Appendix B hereto.

Appeals were taken by the H. A. True family to the United States Court of Appeals for the Tenth Circuit and by Allen True to the United States Court of Appeals for the Ninth Circuit. These appeals were dismissed by the Tenth Circuit Court on July 25, 1980 and by the

Ninth Circuit Court on August 15, 1980. See Appendices C and D.

3. Statement of Facts. In the five H. A. True cases there are several issues not affected by the consolidation in the Tax Court, and which, therefore, will not be discussed in this petition. The matter which will be vitally affected by the consolidation of cases involves the acquisition by True Oil Company, of which H. A. True, Jr. and Jean D. True were the sole partners, of a number of oil and gas leases from Allen True in 1971 and 1972 in exchange for payments by True Oil of bonuses and of advanced royalties in the form of guaranteed minimum overriding royalties ("GMORs"). The Internal Revenue Service ("IRS") has taken three positions involving these transactions which are at issue in these cases:

(a) The GMORs are not true advanced royalties for tax purposes, deductible by True Oil Company, but are bonuses which must be capitalized. For convenience this issue will be referred to herein as the "GMOR Issue".

(b) In the event that it is held that the payments to Allen R. True with respect to the GMORs constitute advanced royalties which are deductible by True Oil Company, then it is held that no deduction is allowable because the transactions involving such payments were not at arm's length terms, did not have a valid business purpose and have no business substance. For convenience this issue will be referred to herein as the "IRS Alternative" position.

(c) That Allen True was not entitled to take cost depletion on the GMOR payments received from True Oil

Company, e.g. could not offset his costs for the leases against the payments received therefor, because the estimated recoverable reserves of the involved oil leases had not been established. For convenience this issue will be referred to herein as the "Cost Depletion Issue".

ARGUMENT

I. There are Special and Important Reasons for Granting Certiorari in these Cases.

In brief, petitioners submit that the consolidation of the Allen True case with the H. A. True cases will act to deny and deprive the latter petitioners of an important right, e.g., their due process right to prosecute their own separate claims and defenses without having them merged into the claims and defenses of others with effect that

irreparable injury will result. See In re Master Key Litigation, 528 F.2d 5 (2d Cir. 1975). Consequently, petitioners respectfully urge that this Court grant certiorari in order to exercise its power of supervision over the lower federal courts. Supreme Court Rule 17.1(a).

II. The Tax Court Order of November 27, 1979 is Appealable.

1.1 Appeals from "decisions of the Tax Court" are authorized by U.S.C., Section 7482 "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury". Appeals from "final decisions of the district courts" [emphasis supplied] are authorized by 28 U.S.C., Section 1291. Without more than noting the difference in language relating to decisions subject to appeal, we respectfully submit that at the very

least the two authorizing statutes should be construed in pari materia. See 9 Moore's Federal Practice, ¶213.03 [1.-3], pp. 13-22. Accordingly, the decisions of the Supreme Court and Courts of Appeal relating to appeals from the District Courts cited below are clearly applicable to appeals from the Tax Court.

1.2 The United States Supreme Court has recognized an exception to the final judgment rule. To paraphrase the exposition of the rule laid down in the case of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949), certain orders of the trial courts are appealable under a limited set of circumstances. The tests for such an appeal can be summarized:

(a) The order is not a step in the final judgment in which it will merge.

(b) When final judgment is made it will be too late to effectively review the order.

(c) Rights to present the party's case on the particular issue will have been lost irreparably by reason of the order.

(d) The order falls in that small class which finally determines claims of right separable from and collateral to rights asserted in the action.

(e) The matter is too important to be denied review.

(f) The matter is too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.

(g) The consideration of the appeal from such an order should be given a practical rather than a technical construction.

Accord, Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 94 S. Ct. 2140, 40 L. Ed. 2d 731 (1973).

1.3 The Courts of Appeals have followed Cohen and Eisen. The Second Circuit has permitted appeals of non-final orders in certain circumstances: MacAlister v. Guterma, 263 F.2d 65 (2d Cir. 1958), order requiring consolidation for pre-trial activities under a consolidated complaint and appointment of general counsel for the consolidated plaintiffs; Garber v. Randell, 477 F.2d 711 (2d Cir. 1973), order in a class action that all actions be consolidated for pre-trial purposes and that plaintiffs file a consolidated amended complaint; Katz v. Realties Equities Corp., 521 F.2d 1354 (2d Cir. 1975), order requiring consolidating of private securities cases for pre-trial

purposes and requiring filing and service of a single consolidated complaint; Lee v. Western Wool Processors, Inc., 313 F.2d 13 (10th Cir. 1962), order requiring plaintiff to redeposit funds in court.

As will be clearly demonstrated below, the instant appeal falls within the exception to the final order rule enunciated by the Cohen and Eisen cases since the consolidation of the Allen True case with the H. A. True cases will result in H. A. True losing permanently as a practical matter the right to have the GMOR issue, litigated and decided by the Tax Court.

III. Consolidation Would Cause Irreparable Injury And Substantial Prejudice To H. A. True.

2.1 The Practical Effect of Consolidation Would Deny H. A. True a Hearing on the GMOR Issue. Support for this position is as follows:

(a) The problem is that if the cases are consolidated, the IRS alternative issue will dominate the proceedings to the exclusion of the GMOR issue and the Cost Depletion issue. This is true because:

(1) The IRS originally raised the IRS Alternative issue in the administrative proceedings prior to the initiation of the Tax Court cases.

(2) If the IRS Alternative issue prevails, the IRS loses its case against Allen True (but not on the merits of the Cost Depletion issue) and at the same time the IRS wins its case against H. A. True on the GMOR issue (but not on the merits of the GMOR issue).

(3) The IRS loses against Allen True because the IRS

Alternative issue treats Allen True as an agent with no tax effect resulting from the payments by True Oil Company to Allen True for the leases. The practical effect is that the merits of the Cost Depletion issue are never reached.

(4) The IRS wins against H. A. True because the IRS Alternative issue treats the payments to Allen True as being made through Allen True as agent directly to the original lessors as bonuses and thus non-deductible by True Oil Company. The practical effect is that the merits of the GMOR issue are never reached.

(5) If separate trials are conducted, the parties will be free to have all three issues considered without prejudice.

(6) The IRS should not be heard to complain about separate trials since it raised the IRS alternative issue in the first place, and the conduct of separate trials is the only way that the IRS can win both cases.

(7) And thus we get to the nub of the problem. The practical effect of the present posture of the cases, e.g., consolidated for trial, is that H. A. True is denied the opportunity to have the GMOR issue litigated on the merits.

IV. The Court Of Appeals For The Tenth Circuit Failed To Recognize The Irreparable Injury To H. A. True

With due respect, it is submitted that the Court of Appeals failed to recognize that H. A. True will suffer irreparable injury if the trials are

consolidated. In its slip opinion, the Court stated:

> ". . . Appellants, argue that because they and their Arizona co-petitioner are differently situated, different issues will be important to the ultimate determination of their respective tax liabilities. They also say that positions of individual petitioners on some of these issues may be antagonistic."

Thus, the Court of Appeals fails to reach the ultimate problem: in fact, H. A. True will suffer "the loss of an important right" as a direct result of the consolidation. This, as the Court of Appeals says in its slip opinion "is an ingredient essential to the application of the doctrine to an otherwise unappealable order."

The ingredient <u>is</u> there. H. A. True will suffer the loss of an important right--to have a trial on the merits of

the GMOR issue. The remedy for this loss is simple--permit separate trials.

Respectfully submitted

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Counsel for Petitioners

UNITED STATES TAX COURT

WASHINGTON, D. C. 20217

DONALD G. HATTEN and TAMMA T. HATTEN, ET AL.,	)	Nos. 13157-78
	)	13158-78
	)	13159-78
	)	13160-78
Petitioner,	)	13161-78
	)	13167-78
v.	)	
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent.	)	

O R D E R

These cases were called from the calendar for the motions session of the Court at Washington, D. C. on March 7, 1979 for hearing on respondent's motions (a) to consolidate the above-captioned cases for trial, briefing, and opinion and (b) to change the place of trial in the case at docket number 13160-78 from Phoenix, Arizona, to Denver, Colorado. A motion to withdraw filed by petitioners' counsel in the case at docket number 13160-78 was also before the Court and was granted. Counsel for respondent in all the cases and counsel for petitioners in all the cases other than the case at docket number 13160-78 appeared and were heard on respondent's said motions. There was no appearance by or on behalf of petitioners in the case at docket number 13160-78. Statements of new counsel for petitioners in that case, concurring in petitioners' objections to respondent's said motions, were before the Court.

After careful consideration of the contents of respondent's motions, the oral arguments of counsel, the briefs of counsel (concurred in with respect to the brief of counsel for the other petitioners by petitioners' counsel in the case at docket number 13160-78), and the entire record herein, the Court having determined that all of the above-captioned cases involve common questions of law and fact, that their consolidation will avoid unnecessary costs, delay, and duplication, and that designation of Denver, Colorado, involves as little inconvenience or expense to the taxpayers as is practicable in the circumstances, it is

ORDERED that respondent's motion to consolidate all of the above-captioned cases for trial, briefing, and opinion is granted. It is further

ORDERED that respondent's motion to change the place of trial in the case at docket number 13160-78 is granted and the place of trial of that case is herewith changed from Phoenix, Arizona, to Denver, Colorado.

(Signed)
Murray H. Falk

Special Trial Judge

Dated: Washington, D. C.
August 27, 1979

APPENDIX B

UNITED STATES TAX COURT

WASHINGTON, D. C. 20217

DONALD G. HATTEN and TAMMA T. HATTEN, ET AL., Petitioner,	)	Nos. 13157-78 13158-78 13159-78 13160-78 13161-78 13167-78
v.	)	
COMMISSIONER OF INTERNAL REVENUE, Respondent.	)	

O R D E R

On October 12, 1979, petitioners in the cases at docket numbers 13157-78, 13158-78, 13159-78, 13161-78, and 13167-78 filed a document entitled Exceptions to Special Trial Judge's Order which the Court docketed as a motion to vacate our Order herein dated August 27, 1979. These petitioners stated that counsel for petitioners in the case at docket number 13160-78 concur in the exceptions set out therein.

After careful consideration of the contents of said motion and thorough review of the entire record in these cases, it is

ORDERED that petitioners' exceptions are denied and the Order of the Special Trial Judge entered August 27, 1979, is in all respects ratified and confirmed, provided, however, that nothing in this Order or in the said Order of the Special Trial Judge shall be construed to deny to the division of the Court to which these

consolidated cases shall be assigned for trial the right under Rule 141(a), Tax Court Rules of Practice and Procedure, upon motion made after said assignment, to order that a portion of the proceedings be held at Phoenix, Arizona, if it then appears to said division that unnecessary costs or delay or duplication may thereby be avoided.

(Signed) C. Moxley Featherston

Judge

Dated: Washington, D. C.
November 27, 1979

APPENDIX C

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

DONALD G. HATTEN and TAMMA T. HATTEN, H. A. TRUE, JR. and JEAN D. TRUE, HENRY A. TRUE, III, and KAREN S. TRUE, DAVID L. TRUE and MELANIE A. TRUE, DIEMER D. TRUE, III and SUSAN L. TRUE,	)	
Petitioners/ Appellants,	)	No. 80-1250
vs.	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent/ Appellee.	)	

Appeals from the
United States Tax Court
(Docket Nos. 13157-78;
13158-78; 13159-78; 13161-78;
13167-78)

Submitted on the briefs pursuant to Tenth Circuit Rule 9:

Claude M. Maer, Jr., Holland & Hart, Denver, Colorado, for Petitioners-Appellants.

M. Carr Ferguson, Assistant Attorney General, and Gilbert E. Andrews, Chief, Appellate Section, Ann Belanger Durney, Karl P. Fryzel, Attorneys, Tax Division, Department of Justice, Washington, D. C., for Respondent-Appellee.

Before BARRETT, McKAY, and LOGAN, Circuit Judges.

PER CURIAM

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. See Fed.R.App.P. 34(a); Tenth Circuit R. 10(e). The cause is therefore ordered submitted without oral argument.

This is an appeal from an order of the United States Tax Court which

directed consolidation of six closely-related cases in that court for purposes of briefing, trial and disposition.

Appellee, by appropriate motion, now challenges our jurisdiction to entertain the appeal.

Appellants are members of the same family who reside at Casper, Wyoming. In the five cases involved here, appellants petitioned the Tax Court for redetermination of their respective income tax liabilities for certain tax years. The Commissioner answered the petitions and sought the consolidation of these cases with that of another family member who resides at Phoenix, Arizona. In support of his motion for consolidation, the Commissioner asserted that the cases involved common questions of law and fact and that trial time would

be substantially reduced by consolidation. Over the objection of all petitioners, and after a full hearing, the Tax Court ordered the requested consolidation. From that order, the Wyoming petitioners have appealed to this court. We are advised that the Arizona petitioner has taken a similar appeal from the same order to the United States Court of Appeals for the Ninth Circuit.

The threshold question is whether the Tax Court's consolidation order is immediately reviewable. We conclude that it is not and must therefore dismiss for lack of appellate jurisdiction.

Courts of appeal have jurisdiction to review decisions of the Tax Court "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury". 26 U.S.C., §7482. Only final decisions of

district courts are reviewable as a matter of right under 28 U.S.C., §1291. Thus, for a Tax Court's decision to be reviewable, it must be final. Estate of Whitlock v. Commissioner, 547 F.2d 506, 509 (10th Cir. 1976), cert. denied, 430 U.S. 916 (1977).

It has long been the rule in this circuit that orders which merely consolidate cases for trial are not immediately reviewable. Skirvin v. Mesta, 141 F.2d 668 (10th Cir. 1944). In Re Master Key Antitrust Litigation, 528 F.2d 5, 13-14 (2nd Cir. 1975); NAACP v. Michot, 480 F.2d 547, 548 (5th Cir. 1973). Cf. Helene Curtis Industries, Inc. v. Church & Dwight Co., Inc., 560 F.2d 1325 (7th Cir. 1977), cert. denied, 434 U.S. 1070 (1978).

Appellants candidly recognize the interlocutory nature of the challenged

order, but insist nevertheless that it is immediately reviewable as a collateral order under Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). In order to bring the Tax Court's order within the collateral order doctrine, appellants argue that because they and their Arizona co-petitioner are differently situated, different issues will be important to the ultimate determination of their respective tax liabilities. They also say that positions of individual petitioners on some of these issues may be antagonistic.

In both Cohen and the later case of Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), the Supreme Court has made it clear that the loss of an important right is an ingredient essential to the application of the doctrine to an otherwise unappealable order. The Cohen

exception to the final judgment rule is a narrow one and is to be applied only in the "plainest cases of prejudice". In Re Master Key Antitrust Litigation, supra at p. 13. We are unpersuaded that consolidation of the related cases will confuse any issues presented to the Tax Court or their varying application to the other petitioners. In sum, there has been no proper showing of exceptional circumstances sufficient to authorize an interlocutory appeal under Cohen. Paramount Film Distributing Corp. v. Civic Center Theater, Inc., 333 F.2d 358 (10th Cir. 1964). See also Arthur Andersen & Co. v. Finesilver, 546 F.2d 338 (10th Cir. 1976), cert. denied, 429 U.S. 1096 (1977).

Appeal dismissed.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALLEN R. TRUE and CYNTHIA F. TRUE,	)	
Petitioners/ Appellants	)	No. 80-7098
vs.	)	Tax #13160-78
	)	WASHINGTON
COMMISSIONER OF INTERNAL REVENUE,	)	(ARIZONA)
Respondent/ Appellee.	)	

Before: ALARCON and CANBY, Circuit Judges.

Upon due consideration of appellee's motion and the opposition thereto, this appeal is dismissed for lack of jurisdiction. The Tax Court's order here in issue is not appealable under Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). Appellants' motion for an extension of time in which to file their brief is denied as moot.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he deposited three (3) copies of the foregoing Petition for Certiorari in the United States mail, first class postage prepaid, registered, return receipt requested, on October 23, 1980, addressed to:

Solicitor General
Department of Justice
Washington, D. C. 20530

Undersigned further certifies that all parties required to be served have been served, that he is a member of the bar of the Supreme Court of the United States and that contemporaneously, he has entered an appearance in this matter.

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